IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.3609 OF 2004

IN

SUIT NO.1657 OF 1994

...

Jairam Timmayya Gowder ...Applicant

v/s.

Kamalabai Dinanath Rajwadkar

and four ors. ...Defendants

And

M/s.K.S.Chamankar & Enterprises ...Respondents

...

Mr.Bavesh Parmar for the Applicant.

Mr.Piyush Shah for Respondent No.1.

Mr.Pimple for the BMC.

Mr.A.R.Shaikh for Respondents Nos. 4 & 5.

Mr.R.D.Soni i/b S.D.Mishra for Respondent No.6.

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CORAM: D.K.DESHMUKH, J.

DATED: 2ND DECEMBER,2005

P.C.:

1. This Notice of Motion is taken out by the Plaintiff for setting aside the order dated 9th July, 2004. Perusal of the order dated 9th July, 2004 shows that that Notice of Motion was taken out by the third party. That Notice of Motion was served on the Plaintiff. The Plaintiff did not care to file any reply to the Notice of Motion. None remained present on behalf of the Plaintiff on 9th July, 2004. Therefore, the court granted that Notice of Motion in terms of prayer clause (a).

2. Explanation that has been given by the Plaintiff for not filing the reply in the Notice of Motion No.1788 of 2002 is to be found in paragraph 3 of the affidavit filed in support of the Notice of Motion. It reads as under:-

"I say and submit that in the order dated 9th July, 2004 the Hon'ble court has observed that no reply has been filed by me and/or my advocate in the Notice of Motion No.1788 of 2002 taken out by the Respondent No.6. I say and submit that I had already affirmed my affidavit in reply to the Notice of Motion No.1788 of 2002 way back on 12th April,2004 but for reasons best known to my advocate the same was not submitted before the Hon'ble Court but I was informed that the said affidavit dated 12th April, 2004 had been submitted in the Hon'ble Court. Hereto annexed and marked Exhibit-H is a copy of my Affidavit in Reply dated 12-4-2004 in Notice of Motion No.1788 of 2002. I crave leave and liberty of this Hon'ble Court to refer to and rely upon my original affidavit in reply dated 12th April, 2004 which I had now obtained in original from my earlier advocate M/s.Bejai & Co. I say and submit that I was not informed by my advocate about the hearing of the matter in the Hon'ble Court on 7th and 9th July, 2004."

3. The concerned lawyer has been joined as Respondent in this Notice of Motion and an affidavit in reply has been filed by the lawyer. That affidavit in reply is dated 2nd March, 2005. Portion of that reply which is relevant for the present purpose reads as under:-

> 6. I say that as regard to allegations contained in para 3 of the Affidavit of the Applicant/Plaintiffs herein I say that contents thereof are false and I say that the true facts are that after affirmation of the affidavit dated 12-4-2004, the Applicant/Plaintiff approached me in the end of April 2004 and took back the entire case paper including the original orders annexed to the aforesaid notice of motion alongwith the original affirmed affidavit dated 12-4-2004 as the Applicant/Plaintiff wanted to change the advocate as her told me that he was in negotiation with the Respondent No.6 with an intention to get flats in the building to be newly

> constructed by the said Respondent No.6. I therefore say that for the reasons aforesaid my tendering the affidavit dated 12-4-2004 does not arise as also the fact of the Applicant/Plaintiffs having obtained original affirmed affidavit dated 12-4-2004. I further say that for the aforesaid reasons the question of my not informing the Applicant/Plaintiffs about the hearing of the matter on 7th and 9-7-2004 does not arise.

4. Thus, the earlier advocate appearing for the Plaintiff has clearly denied the allegation made against him and has claimed that the papers were taken back from the lawyer by the client and therefore he did not file any reply and he did not appear. Though this affidavit has been filed and a copy of which has been given to the Plaintiff in March, 2005, till date there is no affidavit filed by the Plaintiff denying the averments made in the affidavit of the advocate, quoted above. In the absence of any counter filed, the averments made in the affidavit by the advocate deserve to be

accepted. The only explanation that was attempted to be given by the learned advocate appearing for the Plaintiff is that because against the order dated 9th March, 2005 passed by the court declining to grant the ad-interim order in favour of the Plaintiff, the Plaintiff had preferred an appeal and therefore a reply was not filed.

5. In my opinion, this explanation is merely to be mentioned to be rejected. Perusal of the order dated 9th March, 2005 shows that the court has referred to the affidavit of the advocate dated 2nd March, 2005 and has relied on that affidavit to deny the ad-interim order to the Plaintiff. Therefore, the fact that the Plaintiff had filed an appeal against the order dated 9th March, 2005 should have prompted the Plaintiff to file a counter affidavit rather than keeping quiet about it. In my opinion, the conduct of the Plaintiff of making wild allegations against the lawyer and when the lawyer denied those allegations not bothered to counter those allegations shows that there is no substance in the allegations that have been made by the Plaintiff against the lawyer. In my opinion, prima facie also the version of events put up by the

advocate in his affidavit deserves to be accepted, because if the affidavit was sworn on 2-4-2005, there was no reason for the lawyer to withhold it and not to file it. It appears that reckless allegations have been made by the Plaintiff against the lawyer without their being any justification. Notice of Motion is therefore, dismissed. The Plaintiff is directed to pay as and by way of costs of this Notice of Motion Rs.10,000/- to the advocate M/s.Bejai & Co. against whom allegations were made by the Plaintiff.

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